

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

BARBARA MADISON, mother and)	C/A NO. 03A01-9903-CV-00069
natural guardian and next of)	
kin of KIM THI LE PHAN,)	FILED NOVEMBER 24, 1999
deceased, who was a minor)	
sixteen years of age)	
)	
Plaintiff-Appellant,)	
)	
)	
)	
v.)	APPEAL AS OF RIGHT FROM THE
)	WASHINGTON COUNTY LAW COURT
)	
)	
)	
MARIE LOVE, VAL HOLMES, and)	
TRAVIS LOVE, d/b/a ENCORE)	
ENTERPRISES)	
)	
Defendants-Appellees.)	HONORABLE G. RICHARD JOHNSON,
)	CHANCELLOR

For Appellant

EDWIN BARRETT CHARLES
Johnson City, Tennessee

HOWARD R. DUNBAR
Dunbar & Dunbar
Johnson City, Tennessee

For Appellees

RICHARD E. LADD, JR.
MARK E. FRYE
Penn, Stuart & Eskridge
Abingdon, Virginia

OPINION

AFFIRMED AND REMANDED

Susano, J.

Barbara Madison ("Madison") filed this action against Marie Love, Val Holmes and Travis Love (collectively "Encore"), the proprietors of the Encore Nightclub, for the wrongful death of her 16-year-old daughter, Kim Thi Le Phan ("Kim"). The trial court granted Encore's motion for summary judgment based on a pathologist's affidavit reflecting that the cause of Kim's death was unknown. Madison appeals, raising the sole issue of whether the trial court erred in granting Encore's motion for summary judgment as to the claim of negligent failure to render aid to another in peril. We affirm.

I.

On November 17, 1997, Madison filed this suit alleging that Encore was liable for Kim's death. The complaint alleges liability on two theories. The first theory of liability is that Kim's death was attributable to her exposure to a propylene glycol-based theatrical fog used at the Encore Nightclub.¹ The second claim alleges that Encore failed to assist Kim within a reasonable time after she collapsed on Encore's dance floor. More specifically, the second claim asserts that Encore failed or refused to call for an ambulance for a period of time of some five to ten minutes after Kim collapsed and that the delay caused her death.

In response to the complaint, Encore filed a motion for summary judgment on the ground that there was no evidence that either the fog or the delay caused Kim's death. Encore supported

¹This theory was abandoned and is not before us on this appeal.

this motion with an affidavit from Dr. William F. McCormick, the pathologist who performed the autopsy on Kim. Dr. McCormick states in his affidavit that the cause of Kim's death is unknown.

Madison's response to the defendants' motion asserts that the pleadings, discovery, and the McCormick affidavit are insufficient to support the motion for summary judgment. The response further avers that Encore breached a duty to promptly call for an ambulance once it was aware that Kim had ceased breathing and that this breach resulted in Kim's death.

Madison attached two affidavits and an Emergency Medical Service report ("EMS Report") to her response. Kim's sister, Tonya, who was present at the nightclub on the evening in question, states in her affidavit that after Kim collapsed, Encore's management carried Kim to an open door and attempted to prop her up on a chair. Tonya's affidavit further states that Kim was allowed to lay unattended for five to ten minutes while Encore ignored Tonya's requests to phone for an ambulance. Tonya concludes her affidavit by stating that Kim was already dead by the time Encore called the ambulance and that Kim "[c]learly...needed cardio pulmonary resuscitation 10 minutes earlier."

Madison also supported her response with her own affidavit. Madison's affidavit, which clearly was not made on personal knowledge, states that after Kim collapsed, "inadequate care or no emergency care was provided to my unconscious child until after she was dead." The EMS report attached to Madison's

response indicates that the emergency technicians' attempts to resuscitate Kim were met with brief responses from her, but were ultimately unsuccessful.

The trial court granted Encore's motion for summary judgment on both claims. Madison appeals the grant of summary judgment, but only as to her claim for failure to render assistance.

II.

In order to assess whether Encore's motion for summary judgment is well-taken, we must first analyze the plaintiff's complaint.

To prove liability at trial for a cause of action based on a failure to render assistance, a plaintiff must show the following: "(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff which was proximately caused by the defendant's breach of a duty." **Lindsey v. Miami Dev. Corp.**, 689 S.W.2d 856, 858 (Tenn. 1985). To establish causation at trial, the plaintiff must "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." **Id.** at 861 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 269 (5th ed. 1984)). Failure to establish causation is fatal to the case. **Doe v. Linder Constr. Co.**, 845 S.W.2d 173, 181 (Tenn. 1992). Generally, medical causation must

be established by testimony from medical doctors. **Thomas v. Aetna Life & Cas. Co.**, 812 S.W.2d 278, 283 (Tenn. 1991).

In deciding whether a grant of summary judgment is appropriate, courts are to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56.04, Tenn.R.Civ.P. Courts "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." **Byrd v. Hall**, 847 S.W.2d 208, 210-211 (Tenn. 1993).

Thus, the questions a court must consider in determining whether to grant or deny a motion for summary judgment are (1) whether a factual dispute exists; (2) whether that fact is material; and (3) whether that fact creates a genuine issue for trial. **Id.** at 214. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." **Id.** at 215. A disputed material fact creates a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." **Id.** The phrase "genuine issue" refers exclusively to factual issues and not to legal conclusions that could be drawn from the facts. **Id.** at 211.

The party seeking summary judgment has the burden of demonstrating that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. **Id.** at 215. Generally, a defendant seeking summary judgment may meet this burden in one of two ways: (1) by affirmatively negating an essential element of the plaintiff's case, or (2) by conclusively establishing an affirmative defense. **Id.** at 215 n. 5. "A conclusory assertion that the nonmoving party has no evidence is clearly insufficient." **Id.** at 215.

Once the moving party satisfies its burden of showing that there is no genuine issue of material fact, the burden then shifts to the nonmoving party to show that there is a genuine issue of material fact requiring submission to a jury. **Id.** The nonmoving party cannot simply rely upon its pleadings, but rather must set forth, by affidavit or discovery materials, specific facts showing a genuine issue of material fact for trial. Rule 56.05, Tenn.R.Civ.P.; **Byrd**, 847 S.W.2d at 215. The evidence offered by the nonmoving party must be admissible at trial but need not be in admissible form. It must be taken as true. **Byrd**, 847 S.W.2d at 215-216.

A trial court's grant or denial of summary judgment, being a question of law, is reviewed on appeal *de novo* with no presumption of correctness. **Gonzales v. Alman Constr. Co.**, 857 S.W.2d 42, 44 (Tenn.Ct.App. 1993). If we find that there are no genuine issues of material fact and that Encore is entitled to a judgment as a matter of law, we must affirm the trial court's

grant of summary judgment. See **Jones v. City of Johnson City**, 917 S.W.2d 687, 689 (Tenn.Ct.App. 1995). If there is a genuine dispute as to any material fact or any doubt as to the conclusions to be drawn from the undisputed material facts, we must vacate the order granting summary judgment. **Byrd**, 847 S.W.2d at 211.

III.

Encore, as the party moving for summary judgment, bears the burden of demonstrating that there are no genuine issues of material fact and that it is entitled to a judgment as a matter of law. In support of its motion for summary judgment, Encore attached Dr. McCormick's affidavit stating that the cause of Kim's death was unknown. Dr. McCormick is a medical doctor, and, as such, he is competent to testify as to medical causation and his testimony would be admissible at trial. Moreover, the affidavit is certainly more than a conclusory assertion that Madison has no evidence. Because Madison must prove not only that Encore breached a duty owed to Kim but also that this breach caused Kim's death, Dr. McCormick's affidavit demonstrates that Madison cannot establish an essential element of her case.

By demonstrating that Madison cannot establish an essential element of her case, Encore has effectively placed the burden on Madison to show that there is a genuine issue of material fact. Madison attempts to discharge this burden by supporting her position with the affidavit of Kim's sister; Madison's own affidavit; and the EMS report. The sister's

affidavit states that Encore ignored her requests to phone for an ambulance for five to ten minutes after Kim collapsed and that Kim was already dead by the time the call was placed. Madison's affidavit reiterates that Kim received no medical assistance until after she was dead; but her statements are hearsay-based since she was not present on the evening in question. Hence, we cannot consider them. **Byrd**, 847 S.W.2d at 215-16.

The EMS report contains admissible evidence, although not in admissible form. It shows that an ambulance arrived within eight minutes of being summoned and that the technician's attempts to revive Kim resulted in brief responses but were ultimately unsuccessful.

We must take all of the nonmovant's admissible evidence as true and disregard all countervailing evidence. When taken as true, Madison's supporting admissible evidence establishes that when Encore finally called for an ambulance, Kim was already dead. The supporting evidence, however, contains no specific facts suggesting that Encore's delay caused Kim's death.² Madison cannot rely on the assertion of causation in her complaint. We are left with Dr. McCormick's affidavit that the cause of Kim's death is unknown. Assuming, for the purpose of analyzing the issue of summary judgment, that Encore breached a duty owed to Kim, the plaintiff's cause of action is stymied by a fatal deficiency: the cause of death is unknown. If the cause of death is unknown -- and it is on the record now before us -- the

²Even if the affidavit of Kim's sister could be read as suggesting causation, we could not consider it because Tonya is not a medical doctor and thus is not competent to testify as to medical causation.

plaintiff is unable to relate Kim's death to Encore's breach of duty. This being the case, there is nothing for trial and summary judgment was and is appropriate.

Madison's counsel candidly conceded at oral argument that he could not prove that Kim would not have died if the ambulance had been called immediately. Thus, the question of whether Encore delayed in assisting Kim after she collapsed is a disputed fact, but it is rendered immaterial by Madison's inability to establish that the alleged delay caused Kim's death. The defendants have negated an essential element of the plaintiff's cause of action.

IV.

We do not find it necessary to reach Encore's issue that Madison failed to properly respond to the defendants' "separate concise statement of the material facts as to which [Encore] contends there is no genuine issue for trial." Rule 56.03, Tenn.R.Civ.P. We would point out, however, that the requirements of Rule 56.03 are mandatory and must be obeyed, both by movants and nonmovants.

V.

The judgment of the trial court is affirmed. Costs on appeal are assessed against the plaintiff-appellant. This case is remanded to the trial court for the collection of costs assessed there, pursuant to applicable law.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P.J.

D. Michael Swiney, J.